

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : July 19, 2007.
Date of Decision : August 17, 2007.

+ **WRIT PETITION (C) No. 8464 of 2006**

PROF. RAM PRAKASH Petitioner
! Through Petitioner in person.

versus

\$ D.D.A. Respondent
^ Through Mr. C.Mohan Rao, Advocate.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in Digest? YES

JUDGMENT

Dr. S.Muralidhar, J.

1. This writ petition seeks the quashing of a demand raised by the Respondent Delhi Development Authority ('DDA') against the petitioner for a sum of Rs. 1,78,85,011 towards misuse charges in respect of the property at 7, Community Centre, East Of Kailash, New Delhi ('property').

Background Facts

2. The property in question was purchased in the joint names of the petitioner's mother Smt. Savitri, his wife Smt. Kamla Ahluwalia and the petitioner in an open auction held by the DDA on 10.8.1969. The possession of the plot was given to the purchasers on 5.3.1972 and a lease deed was executed on 5.4.1972. According to the petitioner after completion of the building the three co-owners

entered into a partition on 1.12.1976. The first and third floors went to the share of Smt. Savitri Devi, the mezzanine and second floor in favour of the petitioner's wife Mrs. Kamla Ahluwalia and the basement and the ground floor in favour of the petitioner here. Mrs. Kamla Ahluwalia expired on 23.4.1994 and Mrs. Savitri Devi on 6.8.1994 both leaving behind the petitioner and other legal heirs.

3. In response to the request made by the petitioner and other legal heirs to it on 17.2.2004 for grant of mutation, the DDA on 20.5.2004 raised a demand for alleged misuse charges in the sum of Rs.1,78,85,011 for the period up to 5.2.2003 in addition to a sum of Rs. 3712.50 towards arrears of ground rent till 14.7.2004. It was stated in the demand letter dated 20.5.2004 that if the misuse charges were not paid within 30 days action under the terms and conditions of the lease would be taken. The petitioner was also asked to remove the misuse i.e. the use of the basement for storage and unauthorised excess coverage in the mezzanine floor. The petitioner's representations against the demand were impliedly turned down by the DDA when by its letter dated 22.9.2005 to the petitioner it reiterated its demand for misuse charges. The petitioner thereafter filed the present writ petition.

4. In reply to the writ petition the DDA set out the details of the various inspections and show cause notices issued by it. It admitted that when the petitioner sought mutation by his letter dated 17.2.2004 he was informed of the outstanding misuse charges and arrears of ground rent. Along with its counter affidavit, the DDA enclosed the calculation for the misuse charges for the basement from 30.7.1983 to 5.2.2003, the mezzanine from 20.6.1990 till 5.2.2003

and the terrace from 7.9.1992 to 13.1.2003. The Circular dated 18.7.2002 regarding calculation of misuse charges was also enclosed.

5. In his rejoinder the petitioner offered an explanation for each instance of misuse. The petitioner also enclosed copies of the judgments of this Court dismissing the civil revision petitions filed by the tenants of the petitioner in the premises in question.

Question of mutation

6. In addition, the petitioner raised a fundamental issue that the payment of misuse charges cannot be linked with the grant of mutation which in any event was a matter of right. On this aspect, arguments were advanced at the hearing on 13.2.2007 and at the subsequent hearing on 21.4.2007, the DDA informed the Court that it would be willing to grant the mutation independent of the question of the petitioner's liability to pay misuse charges. The Court then passed the following order:

“Pursuant to the order dated 13.2.2007 Mr. C.Mohan Rao, learned counsel for the DDA on instructions submits that the DDA is prepared to carry out the mutation without insisting on the payment of misuser charges. He states that the mutation will be carried out within a period of six weeks from today subject to completion of all formalities and in any event not later than 15.6.2007. If the DDA requires the petitioner to comply any formalities it will write to the petitioner within two weeks from today. The petitioner who appears in person states that on receiving such a letter of request, he will comply within the same within two weeks thereafter.

List on 10.7.2007 for consideration of the other issue regarding legality of the demand of past misuser charges.”

Submissions of the parties

7. Thereafter, the case was considered on the surviving question of misuse charges. The submissions of the petitioner appearing in person were as under:

(i) The impugned demand for misuse charges is unsustainable in law since no prior show cause notice was issued to the petitioner informing him of the basis on which the amount of misuse charges was calculated and seeking an explanation from him thereon. This was in any event in violation of Clause IV of the lease deed which requires prior notice to be issued before effecting either forfeiture or re-entry.

(ii) There is no provision in the lease or the Delhi Development Act 1957 ('DD Act') for recovering misuse charges and so the demand is without the authority of law.

(iii) Without prejudice to the above submissions, it was submitted that there is an implied limitation for recovering misuse charges for past misuse. An analogy was drawn with Section 29(2) of the DD Act which provides for levy of fine for an offence thereunder which, when read with the provisions of Section 468 of the Code of Criminal Procedure 1973 (CR PC) would imply a period of limitation for taking action. The impugned demand which seeks to recover in 2004 misuse charges for a period from 30.7.1983 to 5.2.2003 is barred by laches.

(iv) The misuse charges are by themselves exorbitant since even the calculation showed that the entire area of the premises, and not the area of misuse, taken as the basis for calculation of such misuse charges.

The petitioner also placed reliance on certain decisions of this Court to which reference will be made hereafter.

8. Appearing for the DDA, Mr. C.Mohan Rao Advocate referred to Clause II (13) of the lease deed which permits the lessor (i.e., the President of India represented by the DDA) to allow a change of user “on such terms and conditions including payment of additional premium and additional rent, as the lessor may in his absolute discretion determine.” It is further submitted that the proviso to Clause III gives the lessor the discretion “to waive or condone breaches, temporarily or otherwise, on receipt of such amount and on such terms and conditions as may be determined by him and may also accept the payment of the rent which shall be in arrear as aforesaid together with interest at the rate of six per cent per annum.” This according to him was the legal basis for the demand of misuse charges. He then submitted that there was no limitation for recovery of misuse charges as long as the misuse did not stop; that by not taking a decision on the 14 show cause notices issued to him earlier, the DDA was in fact being lenient to the petitioner; that there was no valid explanation offered by the petitioner for the admitted misuse; that the calculations were correct and were strictly in accordance with the circular dated 18.7.2002 and finally that the petitioner has not pointed out any error in the calculation of misuse charges.

The power to demand misuse charges

9. There are two aspects of the validity of the demand for misuse charges. The first concerns the authority in law of the DDA to recover misuse charges. The second is whether, assuming such authority

exists, the demand for past misuse charges is justified in the facts of the present case.

10. The property in question was given on a perpetual lease jointly in favour of the petitioner, his mother and his wife by a lease deed dated 15.4.1972. Apart from the two Clauses referred to by the DDA i.e. Clause II (13) and Clause III there appears to be no other specific provision in the lease deed that enables the DDA to collect misuse charges. Much less is there any provision which permits the levy and collection of charges for past misuse within a specified period. Therefore, while not disputing that there was no statutory authority in terms of the DD Act, counsel for the DDA sought to justify the demand by referring to the expression “on receipt of such amount and on such terms and conditions” occurring in the proviso to Clause III and submitted that this would include the power to levy misuse charges. The same expression occurs in the proviso to Clause II (13) of the lease deed.

11. The power of the DDA, a statutory body clothed with statutory powers, to levy and collect misuse charges should ideally be found in the statute governing its functions. Even if one were to accept the argument that such power can be traced to the conditions specified in the lease deed, the clauses thereof should specifically identify this power. Unfortunately, they do not. While the clauses refer to ‘additional premium’, ‘additional rent’, ‘such amount’, ‘rent’, the words ‘misuse charges’ find no mention. It does appear to strain the language of the clauses of the lease deed to construe the words “such amount” or “such terms and conditions” to include misuse charges. The decisions cited at the bar have considered the question of the

justification for the levy of misuse charges in individual cases but the existence of the statutory or legal authority of the DDA to levy such misuse charges has not been considered.

12. The DDA appears to have been following the practice adopted by the Union of India, in the Land & Development Office, in recovering damages before reentering a leased property in event of breach of the terms of lease by the lessee. The point at which such charges for misuse are sought to be recovered is either when the lessor decides to condone the breach and not re-enter the leased premises or when the lessor considers the request for conversion of the property from leasehold to freehold basis. In ***Vinay Kumar Agarwal v. Union of India*** 2004 (74) DRJ 675 it was held by a learned Single Judge that the damages that could be recovered by the L&DO in lieu of re-entry had to be limited to the amount specified in the first show cause notice and that the amount could not be reworked time and again thereafter to reflect the current market value. This judgment was confirmed by the Division Bench in ***Union of India v. Vinay Kumar Agarwal*** 116 (2005) DLT 322 (DB) with a slight modification as to the quantum of the damages that could be recovered. The further appeal against this judgment is stated to be pending consideration by the Hon'ble Supreme Court.

13. In the context of the powers of the DDA to levy misuse charges as a pre-condition for grant of conversion, a learned Single Judge of this Court in ***J.K.Bhartiya v. Union of India*** 126 (2006) DLT 302 examined all the applicable circulars of the DDA and the Central Government. It was held that the Circular dated 26.6.2001 of the DDA as further modified on 11.8.2003 permitted levy of misuse charges (as

a condition for the grant of conversion into freehold) limited to “the period of misuse i.e. from the date of vacation of misuse till the date of misuse or up to 28.6.1999, whichever is earlier.” It was noticed that the Government of India also issued a clarificatory direction on 24.6.2003 to the effect that conversion of the leasehold property may be permitted upon payment of misuse charges/damage charges “as applicable under the guidelines of the Lease Administering Authority.” As regards the mutation, the learned Single Judge held that “mutation was to be effected as a matter of right in the name of the seller if a mutation application is pending so that conversion could proceed ahead in favour of the person in possession and acting under a power of attorney.” However, in ***J.K.Bhartiya*** the power of the DDA to recover misuse charges was not directly questioned. The judgment proceeded on the footing that the DDA could validly recover misuse charges.

14. Apart from there being no specific clause in the lease deed permitting the levy and recovery of misuse charges, the recognition of such power, which is not hemmed in by any limitation, is problematic. Any unbridled power is an anathema in our constitutional scheme and a statutory authority like the DDA is no exception to this implied limitation. For instance, can the DDA seek to recover misuse charges twenty years after the misuse has come to an end and only at the time when the lessee seeks conversion of the property from leasehold to freehold?

15. Recently in ***Rattan Kaur v. Delhi Development Authority*** [decision dated 26.7.2007 in W.P.(C) No. 7270 of 2003] this Court had occasion to examine the validity of the demand by the DDA for misuse

charges as a pre-condition to the grant of conversion of a property from leasehold to freehold basis. There the DDA had sought to recover in 1997 misuser charges in relation to a misuse that had stopped in 1979. In the said judgment the decision in *J.K.Bhartiya* was noticed and the three circulars dated 26.6.2001, 8.8.2001 and 11.8.2003 issued by the DDA were analysed. It was held as under:

“The DDA is charged with a statutory duty of ensuring that it takes prompt corrective action after the detection of misuse. Further, the underlying presumption of reasonable exercise of statutory powers in such instance would be that the further corrective action, after the stoppage of misuse, would also be taken within a reasonable time. Just like the DDA cannot seek to prosecute a person for an offence under the Delhi Development Act, 1957 at any length of time, likewise collection of fines and penalties will also have to be done within a reasonable time, if no outer limit for such recovery is specifically mentioned. In other words, there cannot be an open-ended time frame for recovery of misuse charges. If the DDA wants to avoid the loss it might suffer for the failure of its officials to act within a reasonable time, it requires to put its house in order and ensure that the necessary corrective action, in the event of a misuse, and the consequential action after the stoppage of such misuse is taken promptly. The answer to question (ii) is that the demand by the DDA made on 26.9.1997 for the misuse that stopped in February 1979 is unsustainable in law.”

16. While it is a trite proposition that mere possibility of a misuse of a power cannot result in its invalidation, the recognition of such a power without hedging it with in-built limitations can provide a prescription for its continued misuse. The answer to the first aspect concerning the existence of the power of the DDA would appear to be this: the DDA can levy misuse charges provided it adopts a reasonable and fair procedure consistent with the principles of natural justice and further that it exercises such power within a reasonable time. This

envisages seeking an explanation from the lessee of the exact nature of the misuse, taking a decision thereon within a reasonable time and informing the lessee of such decision within a reasonable time thereafter. If the DDA seeks to levy misuse charges then the lessee has to be informed of such decision and the basis of the calculation of such misuse charges has also to be communicated in advance. Otherwise, it would render the power to recover misuse charges arbitrary and unreasonable. On the facts of the instant case, as will be discussed hereafter, it cannot be said that the power to levy misuse charges has been exercised reasonably.

Validity of the demand for misuse charges

17. This Court next examines the justification for the demand for misuse charges on the facts of the present case. As already held by this Court in ***Rattan Kaur*** the levy and collection of misuse charges by the DDA will have to be preceded by a factual determination of such misuse. The narration of facts show that as regards the basement there is no such determination by the DDA, following the show cause notice and reply, that there was in fact misuse of the basement. The assertion in the counter affidavit by the DDA that the misuse of the basement never stopped since 1983 is a bald one without any such determination or decision on record. For instance, the record should show that the reply of the petitioner to the show cause notice was considered and thereafter a decision was taken that there was misuse. Further, the record should show that such decision was taken within a reasonable time and communicated to the petitioner. Finally, the demand for misuse charges should be raised on the basis of such decision. Nothing of that sort is to be found in the instant case. On the other hand, the DDA's own reply shows that

nothing was done to follow up on the issue of the misuse of the basement after the petitioner's reply.

18. The reply affidavit of the DDA mentions that the petitioner was on 8.8.1983 given notice of misuse of the basement to which he replied on 10.8.1983. The DDA record reveals that the tenant NAFED had confirmed by its letter dated 12.8.1983 that they were using the basement "primarily for record and storage." Although these documents are on record the decision of the DDA thereon is not to be found. Therefore as regards the misuse of the basement since 8.8.1983 there is no justification or material produced by the DDA to substantiate its demand for misuse charges for the basement from this period onwards.

19. It is stated by the DDA that an inspection was conducted of the premises in June 1990 and the following non-conforming use was detected:

"Basement

Office of Frooty- Aatsh Industries-cum-Office

Ground Floor

Shops

i) Bombay Enterprises

ii) Diwan Tailors

iii) Lying Vacant

Mezzanine Floor

Office of Ferro alloy Forging and Green Land."

20. The DDA states that it issued to the petitioner a notice dated on 28.6.1990 asking him to show cause was issued why the lease should

not be cancelled for violation of Clause II (13) of the lease deed on account out of the misuse of the basement and the mezzanine floor. The petitioner replied on 25.7.1990 stating:

“In this connection I am to inform you that I had let out my Basement to M/s. Atash Industries (India) Ltd. And my Mezzanine Floor to M/s. Green Land Farms Pvt. Ltd a sister concern of M/s. Ferrow Alloy Forging for commercial purpose according to the prescribed conditions of DDA as will be seen from Clauses No. 7 on page 2 and No. vi on page 1 of the lease agreements of M/s. Atash Industries (India) Ltd and Green Land Farm (Pvt.) Ltd. Respectively.”

Thus it is seen that the petitioner did not deny that he had let out the basement and the mezzanine floor for commercial purpose which was permissible in accordance with the lease deed executed with the DDA since the premises in question, in the Community Centre, was meant for such use. The petitioner further undertook to bring the misuse to the notice of the tenants.

21. Following the petitioner's reply, the DDA issued 'final' notices on 3.9.1990 and 11.12.1990 asking him to stop the breach of the conditions of the lease within 15 days failing which the lease would be terminated. The petitioner replied on 5.11.1990 enclosing a letter from M/s. Atash Industries India Ltd. (to whom the basement had been let out) containing the following explanation:

“In this connection, we would like to mention that the Basement floor of the above premises is being used for storage of our products namely FROOTI Mango & APPY and a small portion of the basement is given to the store-keeper for keeping his records etc. Our office is in the 2nd floor of the said building and the people, that would have been seen by your Inspector were our floating clients and staff, that too for a short while. There is no regular office in the basement.”

22. As regards the basement, the DDA appears not to have done anything further on the show cause notice dated 28.6.1990 or the 'final' notices dated 3.9.1990 and 11.12.1990. It also appears not to have responded to the petitioner's reply on 5.11.1990.

23. It is stated by the DDA that a second inspection was conducted on 31.12.1990 and it was found that 75% of the basement was used for office purposes by M/s. Aatash Industries and remaining 25% was being used for storage. Further, half the mezzanine floor was being used as an office by M/s. Ferro Alloy Forging and Green Land and the remaining half portion was found locked. No show cause notice appears to have been issued after the second inspection.

24. It is then claimed that although a joint inspection in the presence of the petitioner was fixed for 8.2.1991, it could not be undertaken. The premises was inspected for a third time on 24.4.1991 and the following misuse was noticed:

"Basement

Some part of the basement is being used as the storage of Frooty drink and some part of the basement is having sitting arrangement/cabins but at the time of inspection no body was sitting and the cabins are found vacant.

Ground Floor

- i) Bombay Enterprises
- ii) Diwan Tailors
- iii) Lying Vacant

Mezzanine Floor

Office of Ferro Alloy Forging and Green Land which is being

misused.

First floor, Second floor and third floors are being used as offices.”

25. A show cause notice was issued on 8.5.1991 only on the issue of the alleged misuse of the mezzanine floor. The petitioner replied on 21.5.1991 stating that he had no control over the tenants who were not replying despite letters written by him. Further he denied that the mezzanine floor had been misused since Clause II (13) did not restrict the use of the mezzanine floor only for storage. The DDA, however, wrote again to the petitioner on 18.9.1991 pointing out that “as per Architectural Control” the mezzanine floor could be used only for storage and asked him to remove the misuse within 15 days. The petitioner replied on 13.11.1991 stating there must be a misunderstanding as to the ‘architectural controls’ since use of the mezzanine floor for office was a common practice in all the buildings in the Community Centre. The DDA nevertheless stuck to its stand by its further letter of 31.12.1991. Strangely, however, the DDA appears to have not taken further steps on the issue of the misuse of the mezzanine floor thereafter.

26. A fourth show cause notice was issued on 16.9.1992 in respect of unauthorised construction of two rooms on the terrace. The petitioner replied on 30.9.1992 stating that the tenant M/s. Sobhagya Advertising Service had raised the unauthorised construction without the consent of the landlord; that the MCD had been asked to demolish the unauthorised construction and that a case had been filed against the tenant in this Court. Nothing appears to have been done by the DDA thereafter till 11.8.1994 when a fifth show cause notice was

issued referring to certain unauthorised constructions and encroachments to which the petitioner replied on 9.9.1994 stating that it was for the tenants to take the necessary action. It is stated by the DDA since the breaches were not removed final show cause notices dated 28.11.1994 and 11.1.1995 were issued asking that the breaches be removed. Even according to the DDA it did not follow up on the issue of misuse of the terrace thereafter till 17.2.2004 when the petitioner applied for mutation of the property in favour of the legal heirs of the auction purchasers. It calculated misuse charges after it received a notice from the Court of the Rent Controller directing the DDA to calculate and communicate the misuse charges.

27. The narration of facts shows that there is no material on record to support the demand of misuse charges for the misuse of the basement from 8.8.1983 till 5.2.2003. Also, the misuse charges for this period is also barred by laches since the DDA gave up this issue after its inspection of 31.12.1990. It sought to revive the claim belatedly only after the petitioner applied for mutation. As regards the mezzanine floor again the DDA does not appear to have followed up its demand after 31.12.1991. Further, nowhere in the lease deed is there any mention of 'architectural control' which requires the usage to be restricted to storage. It is also not known if the DDA considered the explanation contained in the letter dated 1.12.1991 written by M/s. Ferro Alloy Forging and Green Land confirming that they have vacated the mezzanine with effect from 1.12.1991. Therefore there is no question of the misuse having continued beyond that date. Importantly, there is no determination of the misuse by a conscious decision of the DDA in respect of the mezzanine floor.

28. The position as regards the terrace was no different. In to the show cause notice dated 16.9.1992 regarding unauthorised construction on the terrace, the petitioner replied on 30.9.1992 stating that the tenant M/s. Sobhagya Advertising Service had “unauthorisedly occupied the terrace and raised construction thereon.” The matter had been reported to the MCD and a case had also been filed against the tenants. The DDA does not appear to have taken any immediate action on this reply. A further show cause notice was issued on 11.8.1994 alleging misuse of the basement and the mezzanine floor for an office and that three rooms were unauthorisedly constructed on the terrace. On 9.9.1994 the petitioner wrote to the DDA stating that he had referred the matter to the concerned tenants. Two final show cause notices dated 28.11.1994 and 11.1.1995 were sent repeating the same allegations as in the earlier show cause notices without informing the petitioner of the DDA’s response to his earlier replies.

29. As already noticed, the petitioner had taken steps as regards the unauthorised use of the terrace by the tenant. He has placed on record the orders of this Court in the petitions filed by the tenants resisting eviction. In this context, a reference may be made to two decisions of this Court. The Division Bench of this Court in ***Sahib Singh v. DDA*** 1986 (III) *Municipalities and Corporation Cases* 137 held that where the lessee had further sublet the premises and the sub-tenant had, despite being aware of the restrictions in the lease deed between the DDA and the lessee, violated the terms of the such lease deed then the lessee could not be penalised for such violation as long as he took prompt action to stop the alleged misuser. Likewise in ***Sant Ram Sodhi v. Lieutenant Governor*** 2005 V AD (Delhi) 135 it

was held that the decision of the DDA to recover misuse charges as a precondition to grant conversion was arbitrary and illegal since in the facts of that case the lessee was able to show that he had done everything in his command to stop the misuse of the premises by the sub-tenants.

30. In the instant case, as regards the mezzanine floor, the petitioner has placed on record a letter to the effect that the tenant in that mezzanine floor has in fact vacated the premises on 1.12.1991. Therefore as regards the alleged misuse of the mezzanine floor, the demand for a period after 1991 is not justified. As regards the tenant on the terrace and the ground floor, the eviction proceedings initiated by the petitioner indicate that he has taken all necessary steps to stop the misuse by such tenants. Following the judgment of this Court in ***Sahib Singh*** and ***Sant Ram Sodhi*** it must be held that the recovery of misuse charges from the petitioner in respect of these portions is wholly unjustified.

31. This Court is unable to accept the submissions of the DDA that there is no limitation whatsoever for recovering misuse charges. That would render the power to recover misuse charges arbitrary and unreasonable. The petitioner is right in contending that even where a penalty in terms of Section 29(2) DD Act, has to be recovered within a reasonable time, it is inconceivable that there would be no limitation whatsoever for recovering misuse charges. Also, this Court is not prepared to accept the argument advanced by the DDA that by repeatedly issuing show cause notices to the lessee, without taking any follow up action on such alleged misuse for several years, the DDA was in fact being lenient. By not adjudicating on these show

cause notices and by merely repeating the same charges in the subsequent show cause notices, the DDA cannot expect to give itself a endless period of limitation for adjudicating on the alleged misuse. Significantly, in none of the show cause notices or 'final' notices has the lessee been informed that the DDA is proposing to levy and collect misuse charges. There is therefore no mention of the likely amount of such misuse charges. The petitioner is right in contending that till 2004 he was never informed that he was even required to pay misuse charges. The exercise of the power by the DDA to levy and collect misuse charges in the instant case can by no means be said to be reasonable.

32. For the above reasons, this writ petition deserves to be allowed. The impugned demand of misuse charges in the sum of Rs. 1,78,85,001 raised by the DDA against the petitioner by its letters dated 20.5.2004 and 22.9.2005 is hereby quashed. The DDA is bound by its statement to this Court as recorded in this Court's order dated 21.4.2007 that it will grant the mutation as requested by the petitioner subject to confirming with other formalities.

33. With the above direction, the writ petition is allowed with costs of Rs. 5,000/- which will be paid by the DDA to the petitioner within a period of four weeks.

August 17, 2007
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SD/-
S. MURALIDHAR, J